

IN THE SUPREME COURT OF TEXAS

=====
No. 96-0545
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FORD MOTOR COMPANY, PETITIONER

v.

SUSAN RENAE MILES, INDIVIDUALLY AND A/N/F OF WILLIE SEARCY AND
JERMAINE SEARCY, MINORS, AND KENNETH MILES, RESPONDENTS

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS
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Argued on November 21, 1996

JUSTICE GONZALEZ, joined by JUSTICE HECHT and JUSTICE ABBOTT, concurring.

I agree with the Court's judgment and opinion. However, I write separately to draw attention to an issue the Court does not reach because of its disposition of the case: whether an appellate court may affirm the trial court's judgment for actual damages based on negligence, but remand for a new trial only the issue of punitive damages.

The trial court's judgment against Ford Motor Company included actual damages for negligence and punitive damages for gross negligence. The court of appeals sustained the award for negligence, but reversed and remanded the gross negligence, malice, and punitive damages issues.

922 S.W.2d 572, 599. It concluded that negligence and gross negligence requires entirely different proof and therefore a separate trial on gross negligence is proper. I disagree.

Our appellate rules allow a partial new trial only if the part affected by error "is separable without unfairness to the parties." TEX. R. APP. P. 44.1(b) (formerly TEX R. APP. P. 81(b)(1)).

However, negligence and gross negligence are not separable causes of action but are inextricably intertwined. Negligence is a liability finding, involving duty, breach, and causation. Gross negligence presumes a negligent act or omission and includes two further elements:

(1) viewed objectively from the standpoint of the actor, the act or omission [i.e., harm-causing negligence] must involve an extreme degree of risk, and considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994). The trial court in this case followed standard practice and instructed the jury not to answer the gross negligence and malice issues unless it found harm-causing negligence. See COMM. OF PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE AND MOTOR VEHICLES PJC 4.2A, 4.2B (1996) (conditioning gross negligence and malice issues on affirmative findings of negligence and causation). It would not be fair to have a new trial simply on the defendant's state of mind. The second jury would lack the context to differentiate between negligence and gross negligence. The trial court properly submitted the charge in broad form; consequently, the next jury would not even know what act or omission the first jury found was negligent. In all fairness, the court of appeals could not remand the punitive damages issues alone. Accordingly, for this additional reason, I would reverse and remand the entire cause to the trial court.

Raul A. Gonzalez
Justice

OPINION DELIVERED: March 19, 1998